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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HIPOLITO RIVERA-RAMIREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "successive petition" rule of Sanders v. United States, 83A S.Ct. 1068 (1963), may be invoked to deny a petition or relief where factual issues are involved and Petitioner has been afforded no hearing on either his earlier or his present petition?
2. Whether a motion to withdraw plea made pursuant to Rule 32(d), Federal Rules of Criminal Procedure, on the grounds that the trial court failed to comply with the formal requirements of Rule 11, Federal Rules of Criminal Procedure, states "identical grounds" for relief, within the meaning of Sanders, as a subsequent motion pursuant to 28 USC §2255 to set aside the judgment of conviction and sentence on the grounds that Petitioner was denied his constitutional right to the effective

assistance of counsel at the plea and sentencing proceedings?

3. Whether Petitioner is entitled to a hearing on his motion pursuant to 28 USC §2255 on the "ends of justice" grounds articulated in Sanders where, as here, Petitioner has not previously been afforded any hearing on this or his earlier application for relief?

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OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished Memorandum opinion filed June 30, 1988, affirming the denial of the habeas corpus petition. The Appellate Court's unpublished Order denying the Petition for Rehearing was filed on July 27, 1988. The Memorandum opinion and Order are attached in Appendices B and C, respectively.

Previous to the filing of this habeas corpus petition, Petitioner had filed a motion to withdraw his guilty plea pursuant to Federal Rules of Criminal Procedure, Rule 32(d). The District Court denied this motion without hearing. The Ninth Circuit affirmed the denial in a published opinion, United States v. Rivera-Ramirez, 715 F.2d 453 (9th Cir. 1983), which appears in Appendix A to

this Petition.

JURISDICTION

Petitioner seeks review of the unpublished Memorandum opinion of the United States Court of Appeals for the Ninth Circuit, filed June 30, 1988, entitled United States of America v. Hipolito Rivera-Ramirez, No. 87-5508, which opinion affirmed the District Court decision denying, without an evidentiary hearing, Petitioner's Motion Pursuant to 28 USC §2255 to Vacate, Set Aside or Correct Sentence on the grounds that he had been denied his Fifth and Sixth Amendment rights to due process and the effective assistance of counsel prior to the entry of his guilty plea, and at the plea and sentencing proceedings. On July 27, 1988, the Ninth Circuit denied the Petition for Rehearing. The jurisdiction of

this Court is invoked pursuant to 28 USC §1254(1).

STATUTORY PROVISIONS

The pertinent text of the following statutory provisions is set forth in Appendix D to this Petition: Federal Rules of Criminal Procedure, Rule 11, Rule 32(d); and 28 USC §2255.

STATEMENT OF THE CASE

Petitioner, and others, were jointly charged in a multi-count indictment with various narcotics-related violations. Petitioner was charged in the first two counts: Count 1 alleged a violation of 21 USC §846 [conspiracy]; Count 2 alleged a violation of 21 USC §841(a)(1) [possession with intent to distribute (cocaine)].

Subsequently, Petitioner withdrew his previously entered plea of not guilty and

entered a guilty plea to both counts. The factual basis for the plea was that petitioner worked as a car mechanic for co-defendant Delgado knowing that Delgado and others were engaged in the distribution of narcotics; that as part of the conspiracy, Petitioner knowingly transported cocaine for distribution; and at the time and place of his arrest, Petitioner was aware that cocaine was located on the premises though he did not know the quantity involved.

At sentencing on January 19, 1982, the Government took the position that Petitioner was a ringleader and the person who had been identified in certain seized materials as "HTO." In connection with the Government's argument, the District Court erroneously observed that one of the co-defendants who had previously pled

guilty identified Petitioner as "HTO." Petitioner's trial counsel replied: "Well, that may be." (Response, CR 149, Exhibit F, p. 12, lines 7-12.) In fact, it was demonstrably incorrect that any one of the co-defendants had so identified Petitioner. The record reflects at the point in time of Petitioner's sentencing, three co-defendants had entered guilty pleas. The transcripts of their respective pleas reflect that each of these co-defendants identified Delgado (not Petitioner) as the ringleader and person under whose directions they performed their unlawful duties.

Trial counsel failed to bring this correction to the Court's attention. The prosecutor also failed to correct the trial court's erroneous belief. This same prosecutor was present at each of

the co-defendants' plea proceedings. Consequently, he knew or should have known that the Court was mistaken in its belief that these co-defendants, or any one of them, had identified Petitioner as the ringleader.

Consequently, the trial court proceeded to sentence Petitioner to the maximum of 30 years. A lifetime special parole term was also imposed. This was the harshest of the sentences imposed, obviously based on the trial court's mistaken belief that Petitioner was "HTO."

Thereafter, Petitioner filed a motion pursuant to Federal Rules of Criminal Procedure, Rule 32(d), for leave to withdraw his guilty plea on the grounds that the entry of his plea had been conducted in violation of Federal Rules of Criminal Procedure, Rule 11. (CR 86) There was

no evidentiary hearing on Petitioner's Rule 32(d) motion. After hearing arguments, the District Court denied the motion. Thereafter, the Ninth Circuit affirmed. United States v. Rivera-Ramirez, 715 F.2d 453 (9th Cir. 1983). Specifically, the Court of Appeals held that ". . . violation of the formal requirements of Rule 11 alone does not constitute manifest injustice," and that Petitioner had been sufficiently advised by the District Court. Rivera-Ramirez, supra, at 457.

Subsequently, Petitioner filed a motion pursuant to 28 USC §2255, seeking an order from the District Court setting aside the judgment of conviction and sentence on the grounds that he had been denied his constitutional right to the effective assistance of counsel both at

the entry of the plea and at sentencing. (Motion, CR 146, Declaration of Hipolito Rivera-Ramirez, p. 1, para. 1.) Petitioner's §2255 motion was addressed solely to the Sixth Amendment right to effective assistance of counsel claim. Serious derelictions of trial counsel were alleged, including, inter alia, a failure to prepare and investigate the case; a failure to obtain the services of an interpreter to enable trial counsel to meaningfully confer with Petitioner who was Spanish-speaking; and failure to discuss the elements of the offenses or the possible defenses thereto. Further, Petitioner's §2255 motion alleged he had been informed by trial counsel that, in the event he pled guilty, he would receive a 10-year sentence. Notwithstanding this misrepresentation, trial counsel

instructed Petitioner that, at the plea proceeding, he was to answer in the negative when questioned by the Court whether he had been promised any particular sentence. (Motion, CR 146, Declaration of Hipolito Rivera-Ramirez, p. 3, para. 12.)

Petitioner's ineffective assistance of counsel claim also included trial counsel's omissions at sentencing. For instance, he failed to show Petitioner the Presentence Report or to have the report read to Petitioner by the interpreter so Petitioner would know the contents thereof. (Motion, CR 146, Declaration of Hipolito Rivera-Ramirez, p. 4, para. 17; Response, CR 149, Exhibit F, p. 4, lines 14-18.) Moreover, trial counsel failed to take any meaningful corrective action in response to the District Court's reliance on erroneous information in impos-

ing the maximum sentence. (Motion, CR 146, Declaration of Hipolito Rivera-Ramirez, pp. 5-6, para. 25.)

In response to Petitioner's motion and supporting declaration, the Government submitted, inter alia, the declaration of Petitioner's trial counsel. The declarations of Petitioner and his former counsel are largely contradictory. In several instances, trial counsel failed to respond to certain of Petitioner's factual averments uncontradicted by the record. (Response, CR 149, Declaration of Richard Caballero; Appellant's Excerpt of Record, pp. 24-29; 194-195; Appellee's Excerpt of Record, pp. 37-46; 65-66.)

The §2255 motion was denied without a hearing. (CR 143).

The Ninth Circuit affirmed the District

Court's ruling on the ground that the §2255 motion was a "successive petition" within the meaning of Sanders v. United States, 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068 (1963).

REASONS FOR GRANTING THE WRIT

I

REASONS FOR ALLOWANCE OF THE WRIT (Rule 17, Rules of the U.S.Supreme Court)

Petitioner respectfully requests this Court grant review of the Court of Appeals' decision on the grounds that the Ninth Circuit's decision affirming the denial of Petitioner's §2255 motion on the basis of the "successive petition" rule conflicts with this Court's decision in Sanders v. United States, supra.

II

PETITIONER'S MOTION PURSUANT TO 28 USC §2255 IS NOT A SUCCESSIVE MOTION

A "successive motion" is defined as a petition which raises grounds identical to those grounds raised and rejected on the merits in a prior petition. Sanders, supra, at 15-17. Sanders defined the term "ground" as "a sufficient legal basis for granting the relief sought by the applicant." Sanders, supra, at 16.

The §2255 motion is predicated upon the constitutional claim that Petitioner was denied his Sixth Amendment right to the effective assistance of counsel. The previously filed Rule 32(d) motion was based on the ground that the plea hearing failed to comport with the requirements of Rule 11.

In filing the Rule 32(d) motion, Petitioner sought to withdraw his guilty plea on the ground that the plea hearing did not comport with the requirements of Rule

11, in that the District Court failed to, inter alia, sufficient advise Petitioner of the nature of the charges and the consequences of the plea. (CR 86, pp. 8, et seq.) While the Rule 32(d) motion made reference to certain allegations concerning Petitioner's former counsel's representation, these allegations were not made pursuant to a claim of ineffective assistance or as a separate, legal ground justifying relief; rather, they were offered as circumstantial evidence in the context of demonstrating why Petitioner did not understand the import of his plea, thus substantiating the merits of his legal claim under Rule 11 and Rule 32(d). In fact, the Sixth Amendment issue was not even briefed in the Rule 32(d) motion.

In contrast, Petitioner's §2255 motion

is supported by specific factual averments of ineffectiveness and is based specifically on the Sixth Amendment claim that Petitioner was denied the effective assistance of counsel as a result of his former attorney's omissions, misstatements, and erroneous advice. This constitutional ground is not identical to the Rule 11 issue raised previously. Sanders, supra.

III

THE "SUCCESSIVE PETITION" RULE DOES NOT APPLY IN A CASE SUCH AS THIS WHERE PETITIONER WAS NOT AFFORDED A HEARING ON HIS FIRST APPLICATION.

As discussed hereinabove, the §2255 motion was not a successive petition in the first instance since it did not assert a claim for relief on the identical grounds as those raised and rejected on

the merits in the previously filed Rule 32(d) motion. Sanders, supra.

Moreover, in articulating the Successive Petition Rule, the Court in Sanders clearly contemplated that the rule would be invoked to deny a petition or relief only where the petitioner had an opportunity for a full and fair hearing on his first petition. Sanders, at 15-17. Indeed, Sanders relied on the case of Salinger v. Loisel, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed.989, where the first motion was denied after a full hearing. Sanders, at 9-10.

The "hearing" contemplated by §2255 is evidentiary in nature. It is an "adversary, judicial hearing" which affords Petitioner the opportunity to present evidence on the allegations which, if proven true, would entitled him to

relief. 28 USC §2255; United States v. Underwood, 577 F.2d 157, 159 (1st Cir. 1978); Machibroda v. United States, 368 U.S. 487, 495, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962):

> "'Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof. . .'."
>
> Machibroda, supra, at 495, citing Walker v. Johnston, 312 U.S. 275, 278, 85 L.Ed. 830, 61 S.Ct. 574.

There was no evidentiary hearing on Petitioner's Rule 32(d) motion. (CR 92) There was only legal argument and "argument is not evidence. . .". Rivera-Ramirez, supra, at 457, n. 4. Accordingly, under the Sanders decision, the successive petition rule is improperly invoked where, as here, Petitioner was not afforded a hearing on his first petition.

IV

THE ENDS OF JUSTICE DICTATE THAT PETITIONER IS ENTITLED TO A HEARING

In Sanders, this Court appeared to be quite clear that the second petition should be considered on the ends of justice grounds if petitioner was not afforded a full and fair hearing pursuant to his first petition.

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair. . .". (Emphasis added.)

Sanders, supra, at 16-17.

There is no dispute but that factual issues are involved here. Petitioner and his former counsel filed contradictory

declarations in support of both the earlier motion to withdraw his plea under Rule 32(d), and the present §2255 motion. (Petitioner's Excerpt of Record, pp. 24-29; 194-195; Appellee's Excerpt of Record, pp. 37-46; 65-66.)

The counter-declarations of Petitioner and his former counsel raise an issue, inter alia, of whether former counsel made promises outside the record and instructed Petitioner how to respond to the Court's questions during the Rule 11 proceedings so that the Court would accept Petitioner's guilty plea. It has long been the rule in the Ninth Circuit that where a Petitioner alleges that his attorney made promises outside the record to induce his plea, an evidentiary hearing is required. Mayes v. Pickett, 537 F.2d 1080, 1083 (9th Cir. 1976), cert.

denied, 431 U.S. 924 (1977); Jones v. United States, 384 F.2d 916-917 (9th Cir. 1967); Marrow v. United States, 772 F.2d 525, 526 (9th Cir. 1985).

The uncontroverted fact is that Petitioner was not afforded a hearing pursuant to either his Rule 32(d) or his §2255 motion. The docket sheet plainly reflects this fact: At p. 176 of Petitioner's Excerpt of the Record, the docket entry for June 14, 1982 (Docket No. 92) reflects no hearing was held, and that the Rule 32(d) motion was simply "denied." That being the case, Sanders dictates that Petitioner is "entitled" to a hearing. Sanders, supra.

CONCLUSION

Based on the foregoing, the Successive Petition Rule of Sanders, supra, is not applicable. Assuming arguendo the rule

does apply, Petitioner is nonetheless entitled to a hearing as required by the ends of justice since his first petition did not obtain a full and fair hearing, or any hearing at all. Finally, given the lack of any hearing and that factual issues are in dispute, Petitioner is entitled to a hearing. Espinoza, ___ F.2d _____ (No. 86-5565, Mar. 9, 1988). In light of the foregoing, it is respectfully submitted that certiorari should be granted in this case.

Respectfully submitted,

STANLEY I. GREENBERG
ABBY BESSER KLEIN

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Hipolito RIVERA-RAMIREZ,
Defendant-Appellant.

No. 82-1387

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 7, 1983
Decided Sept. 6, 1983.

Hipolito Rivera-Ramirez appeals an order denying his Fed.R.Crim.P. 32(d) motion to withdraw his guilty plea. Because none of the asserted errors constitutes manifest injustice, the denial of the motion was not an abuse of discretion. We therefore affirm.

Rivera-Ramirez was indicted on one count of possession of cocaine with intent to distribute and one count of conspiracy. 21 U.S.C. §§841(a) and 846. He pleaded not guilty to these charges, but

subsequently entered into plea negotiations with the United States Attorney prosecuting the case. Through his attorney, Rivera-Ramirez agreed to accept the plea agreement offered by the Government.

At a hearing on November 16, 1981, Rivera-Ramirez withdrew his plea of not guilty to both counts of the indictment. He was represented by counsel and also aided by an official court interpreter. The district judge read to Rivera-Ramirez the charges pending against him. The judge then questioned him as to his understanding of his trial rights and his satisfaction with his attorney's representation. Rivera-Ramirez responded that he understood each of his constitutional rights and that his plea was not the product of coercion, promises, or threats, but would be given freely and

voluntarily. He acknowledged that the plea agreement he had entered into was based only on the Government's promise not to indict him on an additional charge, that no representations had been made as to the sentence he would receive. He stated his understanding that the court "can give me a fifteen-year sentence for each charge and $25,000 fine for each," and was further advised of the possibility of a maximum lifetime special parole term and of an impact on his immigration status. The judge then explored the factual basis for the plea, accepting comments from Rivera-Ramirez, his attorney, and the prosecutor. Having found that the plea was knowing and voluntary and that a factual basis existed, the court accepted Rivera-Ramirez's plea of guilty to both counts.

At a subsequent hearing, he was sentenced to the maximum penalty -- two consecutive fifteen-year terms, a fine of $50,000, and a lifetime special parole term.

Several months later Rivera-Ramirez obtained new counsel. On May 17, 1982, he filed a motion under Fed.R.Crim.P. 32(d) for leave to withdraw his guilty plea. He contended his plea hearing had been conducted in violation of Fed.R. Crim.P. 11 and various constitutional provisions. Following a hearing, the district court denied the motion, and Rivera-Ramirez appeals the refusal to permit withdrawal of the plea.

Rivera-Ramirez's primary contention on appeal is that the district court failed to comply with the requirement of Rule 11(c)(1) that the court "address the defendant personally in open court and

inform him of, and determine that he understands, . . . the nature of the charge to which the plea is offered...." Specifically, Rivera-Ramirez argues that, following the reading of the indictment, the court was obligated to explain further the terms "conspiracy" and "possession" and to inquire as to Rivera-Ramirez's understanding of these terms. He contends that the court's failure to satisfy the formal requirements of Rule 11 invalidated his guilty plea.

These claims require us to determine what burden a defendant bears in asserting a claim under Rule 32(d). Rule 32(d) provides:

> A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to

correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In McCarthy v. United States, 394 U.S. 459, 472, 89 S.Ct. 1166, 1174, 22 L.Ed.2d 418 (1969), the Supreme Court, in reviewing a judgment on direct appeal, held that a defendant whose plea was accepted in technical violation of Rule 11 was entitled to have the plea set aside and to plead anew. Until recently there was considerable question as to whether a technical violation of Rule 11 entitled the defendant to have the plea set aside in a collateral proceeding under 28 U.S.C. §2255 or under Fed.R.Crim.P. 32(d).

The Supreme Court in United States v. Timmreck, 441 U.S. 780, 784-85, 99 S.Ct.

2085, 2087-88, 60 L.Ed.2d 634 (1979), held that a technical violation of Rule 11 would not support a collateral attack under section 2255 on a conviction based on a guilty plea, where there was no showing of constitutional error or special prejudice. After Timmreck, we held that collateral relief was not available when all that was shown was a failure to comply with the formal requirements of Rule 11. United States v. Lopez-Beltran, 619 F.2d 19, 20 (9th Cir. 1979)[1]

We emphasize that Rivera-Ramirez did not directly appeal the judgment of conviction in this case by filing a notice

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[1] That case involved a motion to dismiss an indictment, under 8 U.S.C. §1325 for illegal entry, in which the alien contended that a prior conviction was invalid because of a failure to comply with Rule 11 in accepting the guilty plea.

of appeal within the ten-day requirement of Fed.R.App.P. 4(b), as was the case in McCarthy, nor did he file his Rule 32(d) motion within that ten-day period. Instead, he attacked the judgment several months later under Rule 32(d). Under those circumstances, his motion amounts to a collateral attack and he must meet the burdens imposed upon a defendant who seeks to set aside his plea in collateral proceedings. See United States v. Watson, 548 F.2d 1058, 1063 (D.C.Cir. 1977); United States v. Laura, 500 F.Supp. 1347, 1355 (E.D. Pa. 1980); see also Borman, The Hidden Right to Direct Appeal from a Federal Plea Conviction, 64 Cornell L. Rev. 319, 327 (1979).

Section 2255 and Rule 32(d) provide alternate routes to set aside a guilty plea collaterally. Under section 2255 it

is clear that claiming a technical violation of Rule 11 is insufficient. Instead, the defendant's burden is to establish a constitutional or jurisdictional error, or that the proceeding in which his plea was accepted was "inconsistent with the rudimentary demands of fair procedure" or resulted in a "complete miscarriage of justice." Timmreck, 441 U.S. at 783-84, 99 S.Ct. at 2087 (quoting Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962). It must also be claimed that the procedural error prejudiced the defendant in that he was actually unaware of the consequences of his plea decision and, if property advised, would not have pleaded guilty. Id.; see United States v. Crook, 607 F.2d 670, 672 (5th Cir. 1979); United States v. Horsley, 599

F.2d 1265, 1269 (3d Cir.) (en banc), cert. denied, 444 U.S. 865, 100 S.Ct. 135, 62 L.Ed.2d 88 (1979); Alessi v. United States, 593 F.2d 476, 478 (2d Cir. 1979), cert. denied, 451 U.S. 937, 101 S.Ct. 2015, 68 L.Ed.2d 323 (1981).

A Rule 32(d) motion filed after the time for appeal has expired is also collateral in nature, and the strict standard of McCarthy does not apply. Instead, the provisions of Rule 32(d) require that "manifest injustice" be found.

It has been suggested that Rule 32(d) and section 2255 standards lead to identical results. See C. Wright, 3 Federal Practice and Procedure §539 at 211 & n. 11 (2d ed. 1982); cf. Watson, 548 F.2d at 1063. The section 2255 standard is supported by concern for judicial economy and the finality of judgments. Timmrick,

441 U.S. at 784, 99 S.Ct. at 2087. We have held that a Rule 32(d) motion invokes similar considerations:

> "[I]f a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process."

Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963) (emphasis and footnote omitted).

We need not, however, determine in this case whether the section 2255 standard applied in Timmreck is identical for all purposes to the manifest injustice

standard of Rule 32(d). [2] It is sufficient hold in this case that violation of the formal requirements of Rule 11 alone does not constitute manifest injustice. It is our view that United States v. Cantor, 469 F.2d 435, 437 (3d Cir. 1972), cited by appellant, which holds to the contrary, has been undermined by Timmreck. [3] We thus review the

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[2] The question of degree of the overlap between section 2255 and Rule 32(d) was also left open by this court in United States v. Harris, 534 F.2d 141 n. 1 (9th Cir. 1976). Our holding does not foreclose the possibility that some circumstances, not present in the instant case, might constitute "manifest injustice" without amounting to a violation of due process or another fundamental right. See J. Moore, 8A Moore's Federal Practice para. 32.07[4] (2d ed. 1978); Borman, The Hidden Right to Direct Appeal From a Federal Plea Conviction, 64 Cornell L. Rev. 319, 333 & n. 81 (1979).

[3] Timmreck also reserved the question whether a technical violation could be a basis for collateral relief if it "occurred in the context of other aggravating circumstances." 441 U.S. at 784-

procedure followed under Rule 11 to determine not whether there was a technical violation, but whether manifest injustice resulted.

Rivera-Ramirez claims that he was not adequately advised of the charges against him. Although Rule 11(c) requires the district court to inform the defendant of the nature of the charges against him, no specific method of advising the defendant is mandated. See Fed.R.Crim.P. 11 Advisory Committee NOte on 1974 Amendment; Mack v. United States, 635 F.2d 20, 25 (1st Cir. 1980). The information provided the defendant is sufficient if it provides him "an understanding of the law in relation to the facts" and thus permits a voluntary plea. McCarthy, 394

85, 99 S.Ct. at 2087-88.

U.S. at 466, 89 S.Ct. at 1170. In this case, the district court read the two counts of the indictment to Rivera-Ramirez, then asked whether those were the charges to which he wished to plead guilty. The indictment read by the judge was unique in that it was unusually factually detailed. Although we do not suggest that reading the indictment will in most instances satisfy the requirements of Rule 11, we conclude that the procedure adopted here did not result in manifest injustice. The detailed indictment allowed Rivera-Ramirez, aided by his attorney and an interpreter, to understand the charges against him. Moreover, Rivera-Ramirez has made no showing that he was prejudiced by the court's failure to further explain the charges. He did not claim, at the hearing on his motion

to withdraw the plea or in his affidavit submitted to the district court, that he did not understand the charges or that, better advised, he would not have pleaded guilty.[4] The record of the plea hearing does not support the inference that Rivera-Ramirez did not comprehend what transpired. For these reasons, the district court correctly determined that the failure to explain the charges did not cause Rivera-Ramirez to suffer manifest injustice, and the refusal to permit withdrawal of the plea on this basis was not an abuse of discretion.

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[4] Rivera-Ramirez's attorney argued before the district court that a person in Rivera-Ramirez's situation would have difficulty understanding the charges against him. Argument is not evidence of the defendant's subjective understanding, and thus does not establish prejudice.

Rivera-Ramirez also argues that there was not a sufficient factual basis for the plea. Rule 11(f) requires the court to explore the factual basis in order to determine the accuracy of the plea. United States v. Barker, 681 F.2d 589, 592 (9th Cir. 1982). The rule prescribes no specific method of establishing the factual basis. See Fed.R.Crim.P. 11 Advisory Committee Note on 1974 Amendments. However, it must be established on the record that there is sufficient evidence to support the conclusion that the defendant is guilty. Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976).

The district court first elicited a statement from Rivera-Ramirez, who

admitted to working as a mechanic on vehicles that he knew were used in drug transactions. When the prosecutor was asked to supplement this statement, he noted Rivera-Ramirez had been "unduly modest," and had, in fact, held a prominent role in a very large-scale drug distribution conspiracy. In support of this contention, the prosecutor specified that the conspiracy was based in four apartments in a complex in Van Nuys, California, and that Rivera-Ramirez had rented at least two of the apartments. In an authorized search of these apartments, agents of the Drug Enforcement Agency recovered 113.5 pounds of cocaine and approximately $2,000,000 in currency. They also seized a money-counting machine, weapons, and ledgers in which the details of the operation were recorded.

The ledgers revealed distribution of over 3,600 pounds of cocaine, which yielded $73,000,000. the ledgers also identified the head of the conspiracy as "HTO." Because Rivera-Ramirez's true name is Humberto, because he was arrested in the apartment designated as headquarters of the operation, and because he had obtained vehicles and apartments for the conspirators' use, the prosecutor inferred that Rivera-Ramirez was HTO. The ledgers indicated HTO's personal involvement in the conspiracy on numerous occasions, including trips to Miami to obtain cocaine and distribution to local dealers in Van Nuys.

Neither Rivera-Ramirez nor his attorney commented directly on this evidence, but in response to the court's questions, Rivera-Ramirez admitted he had

transported a substance he knew to be cocaine. He also admitted he knew of no reason why his plea to the charges of conspiracy and possession with intent to distribute should not be accepted.

Within the context of this hearing, we consider this factual development to be minimally adequate. A more direct response from the defendant to the prosecutor's statements, and more detailed questioning of the defendant, definitely would have been preferable.[5] However,

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[5] The limitations on the factual development of this record resulted in part from tactical decisions by Rivera-Ramirez and his attorney. When Rivera-Ramirez was asked if he disagreed with any part of the prosecutor's supplemental statement, his attorney interjected that Rivera-Ramirez wished to admit his guilt "in a manner that would least inculpate himself and other people." The attorney urged the court to accept the plea on the basis of the limited factual development and to rely instead on the presentence report.

because nothing on the record places the accuracy of the plea in doubt, the failure to develop a fuller record did not result in manifest injustice.

We address only briefly Rivera-Ramirez's remaining contentions, which are without merit.[6] He argues Rule 11(c)(1) was violated in that he was not advised of the minimum possible special parole term he might be required to serve. Because he was advised that Count Two required a special parole term, that it might be a life term, and that it would convert to a life term in prison if the parole terms were violated, no

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[6] Rivera-Ramirez also asserts a challenge to his sentence and a claim that denying his new attorney access to the presentence report violated due process. Neither of these contentions is properly before this court on review of a Rule 32(d) motion.

possible prejudice could have resulted from this technical error.[7]

Rivera-Ramirez contends his attorney misinformed and misled him in negotiating and tendering his plea and, in general, provided ineffective assistance. He stated at the plea hearing, however, that he was satisfied with the representation he had received. He also avowed his understanding of each of the rights he now contends were erroneously defined by his attorney. These solemn declarations made in open court carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977); United States v. Moore, 599 F.2d 310, 314 (9th

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[7] The prosecutor did state at the hearing that the court would be obliged to impose a minimum three-year special parole term on Count Two.

Cir. 1979), cert. denied, 444 U.S. 1024, 100 S.Ct. 687, 62 L.Ed.2d 658 (1980). The district court rejected Rivera-Ramirez's after-the-fact statements to the contrary. Because the assertions that the attorney had misled him are without support in the record, the court's credibility judgments were proper. See United States v. Degand, 614 F.2d 176, 178 (8th Cir. 1980); United States v. Becklean, 598 F.2d 1122, 1125-26 (8th Cir.), cert. denied, 444 U.S. 864, 100 S.Ct. 135, 62 L.Ed.2d 87 (1979).

Rivera-Ramirez asserts the prosecutor did not reveal the full terms of the plea agreement to the court. He and his counsel expressly stated at the plea hearing that the agreement had been fully disclosed. His later statements to the contrary are without support.

The order denying leave to withdraw the guilty plea is AFFIRMED.

APPENDIX B

FILED
June 30, 1988
Cathy A. Catterson,
Clerk, U.S. Court
of Appeals.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HIPOLITO RIVERA-RAMIREZ, Defendant-Appellant	CA No. 87-5508 DC No. CV-86-5166-TJH CR-81-908-TJH MEMORANDUM*

Appeal from the United States
District Court for the Central
District of California
Honorable Terry J. Hatter, Jr.,
District Judge, Presiding
Argued and Submitted May 2, 1988
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

Before: FLETCHER, FARRIS, and PREGERSON, Circuit Judges.

The Government maintains that Rivera's §2255 motion is a successive petition. We agree. The crux of his earlier Rule 32(d) motion was his claim of dereliction on the part of his attorney. See United States v. Rivera-Ramirez, 715 F.2d 453, 457-58 (9th Cir. 1983). The ineffective assistance claims he now raises in his §2255 motion are "identical" to those in the Rule 32(d) motion under Sanders v. United States, 373 U.S. 1, 16 (1963). Sanders requires that we affirm unless Rivera establishes that the ends of justice would be served by reconsideration of his claims. Id. at 15. He has made no such showing. The denial of his habeas corpus petition is therefore

AFFIRMED.

APPENDIX C

FILED
July 27, 1988
Cathy A. Catterson,
Clerk, U.S. Court
of Appeals.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	CA No. 87-5508
Plaintiff-Appellee,	DC No. CV-86-5166-TJH
v.	(CD Calif.)
HIPOLITO RIVERA-RAMIREZ,	ORDER
Defendant-Appellant.	

Before: FLETCHER, FARRIS, and PREGERSON, Circuit Judges.

Appellant's petition for rehearing is denied.

APPENDIX D

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and,

when applicable, that the court may also order the defendant to make restitution to any victim of the offense;

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceedings and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or

nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart

from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of

other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the

agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agree-

ment. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such

other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in

the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not

enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32. Sentence and Judgment

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(d) Plea Withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255.

§2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sen-

tence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him

relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.